

Regular Meeting

Agenda Item #	3
Meeting Date	September 12, 2005
Prepared By	Lonni Moffet, Communications Director
Approved By	Barbara B. Matthews City Manager

Discussion Item	Resolution Re: Federal Legislation on Cable Franchising Issues
Background	<p>There are three bills pending in Congress which would greatly diminish, if not eliminate, the ability of local government to regulate their own public rights-of-way. S.1349 and companion bill H.R.3146, the "Video Choice Act of 2005," would grant national franchises to telephone companies which seek to provide video services. S.1504 would end regulation of cable television services as we know it today; all cable franchises would terminate on the date of its enactment.</p> <p>All of the major local government associations have taken strong positions in opposition to these bills. These include NLC - National League of Cities; US Conference of Mayors; NACO - the National Association of Counties; and NATOA - the National Association of Telecommunication Officers and Advisors. In addition, various community and public interest media associations are also opposing these bills such as the Alliance for Community Media; and TeleCommUnity, the local government telecommunications alliance.</p>
Policy	These three bills have the potential to seriously modify the way local governments regulate their public rights-of-way. Residents would lose the ability to address customer service complaints to local government regulators. Franchise fee payments would be threatened, if not eliminated, and funding for PEG operations (Public, Educational and Government Access channels) would disappear.
Fiscal Impact	In the worst case scenario, Takoma Park could stand to lose over \$1,755,000 in franchise fee, operating grant and capital equipment monies over the next seven years.
Attachments	<p>Draft Resolution</p> <p>Materials from NATOA: Local Government: Partner in Promoting Video Competition; S.1504 Action Alert; S.1504 Sample Letter; S1349 Action Alerts; More information is available on the City web site, including: S1504 Text (72 page pdf)</p>
Recommendation	Pass attached resolution; Direct staff to write letters of opposition; Individual Councilmembers are requested to call and/or write our Federal representatives; and communicate with residents.
Special Consideration	

Introduced by:

Resolution 2005-_____

Resolution Expressing Opposition to Cable Franchising and Rights-of-Way Legislation

WHEREAS, on June 30, 2005 Senators Gordon Smith (R-Oregon) and John Rockefeller (D-WV) introduced S. 1349, "The Video Choice Act of 2005;" and

WHEREAS, on June 30, 2005 Representatives Marsha Blackburn (R-TN) and Albert Wynn (D-MD) introduced H.R. 3146, "The Video Choice Act of 2005"; and

WHEREAS, the City Council of Takoma Park Maryland opposes passage of S.1349 and H.R. 3146 because this proposed legislation:

- Creates a National Franchise for "Competitive Video Services Providers (CVSPs)," which are essentially telephone companies (or others) who already have authority to use the public rights-of-way, thus treating cable and broadband service providers unequally, a direct conflict with the principle of competitive neutrality;
- Prohibits local franchising authorities (LFAs) from requiring a franchise agreement from these CVSPs, thus taking away local government's ability to manage its own rights-of-way;
- Permits payment of a franchise fee of no more than currently allowed levels (5%), but provides no mechanism for collection of these fees;
- Requires carriage of existing Public, Educational and Government (PEG) access channels but provides no provisions for capital or operating support for PEG channels or Institutional Networks and if no PEG channels exist in a market, none will be created;
- Undermines Universal Service provisions so that entire communities could be redlined (the practice of not serving all areas, typically lower income, minority areas) as local franchising authorities would not have the ability to require system build-outs to a minimum density; and
- These bills, rather than promote competition, favor one industry group over the incumbents which will ultimately decrease customer service standards and not provide the best options for our residents.

WHEREAS, on August 2, 2005, Senators John Ensign and John McCain introduced the Broadband Investment and Consumer Choice Act of 2005 (S. 1504); and

WHEREAS, the City Council of the City of Takoma Park, Maryland, opposes the passage of S. 1504 because:

- The bill would preempt all local authority over the provision of cable and video services within the community, including the ability of the local government to provide appropriate oversight to entities conducting business within their jurisdiction and in the local public rights-of-way;
- The City's negotiated contract with its cable operator would be abrogated under the terms of the bill;

- The bill would substitute a new compensation methodology on the parties to the City's existing franchise contract, depriving the City of the agreed-upon bargain by lowering the existing franchise fee and replacing it with a fee which must be justified as being "reasonable" in the eyes of the user, limited to management costs (which denies the rights of the property owner to obtain fair and reasonable compensation for the use of public property for private gain), and not in excess of 5%;
- These requirements and restrictions would result in the creation of a subsidy to the cable and telecommunications industries; at the expense of the City's taxpayers;
- The bill would further substantially reduce the revenues that are now includable in the definition of "Gross Revenues" so that even if the franchise fee did in fact remain at 5%, the City's revenues from the fee would be significantly less due to the smaller revenue base;
- The bill would substantially reduce the amount of capacity which may be required by local governments to meet their public, educational and government ("PEG") access needs, while stripping the City of the ability to obtain capital support for the use of PEG capacity – part of the bargain contained within the City's negotiated franchise agreement – with the result that the community's cable-related needs and interests would not be met;
- The bill would deprive local citizens of the ability to address local issues locally, by removing to the state all customer service issues, and further by denying consumers any form of recourse for any actions of a communications provider;
- The bill would eliminate any build-out requirements for any video service provider, thereby allowing providers to discriminate based on the wealth of the local neighborhoods they choose to serve;
- The bill would preempt any state or local law that is not generally applicable to all businesses, thereby potentially preempting any law applicable to only certain classes of businesses, such as utilities and rights-of-way users (such as requiring undergrounding of facilities and ensuring electric code compliance);
- The bill would prohibit the City from imposing any fee for issuance of rights-of-way construction permits yet would require the City to act on requests for permits in a timely manner as determined by the FCC, thereby insinuating inappropriate federal government involvement in the basic day-to-day management of local rights-of-way;
- The bill would prohibit municipalities and their utilities from providing communications services without giving a right of first refusal to private industry, and would then grant industry unfettered access to all municipal facilities and financing in the event private industry chooses to provide services;
- The bill would deprive the City of the authority to establish and maintain government owned and operated networks, known as institutional networks, that may be utilized by first responders and other government officials in the day-to-day management of the City's business;

- The bill would permit broadened preemption of local zoning decisions relating to the placement of cell towers, depriving local jurisdictions of the authority to ensure that such towers are safely and appropriately located in areas to provide the greatest degree of services without unnecessarily posing a hazard to the public health, safety and welfare; and
- The bill would eliminate the protection the City currently has against liability for damages and attorneys fees in lawsuits brought by communication service providers against local governments, a type of litigation that the bill would seem to invite service providers to bring.

WHEREAS, for these reasons, the City Council finds that it should oppose S. 1504, S.1349 and H.R. 1349 and urges the Maryland Congressional Delegation and other members of Congress to oppose these bills; and

WHEREAS, the City Council finds that this Resolution should be forwarded to the Maryland Congressional Delegation, other members of Congress as deemed appropriate, and to the President of the United States.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF Takoma Park, Maryland THAT:

Section 1. For the reasons stated above, the City Council of the City of Takoma Park, Maryland declares its opposition to S. 1504, S. 1349 and H.R. 3146 and urges the Maryland Congressional Delegation and all other members of Congress to oppose S. 1504, S. 1349 and H.R. 3146.

Section 2. The City Council hereby directs that this Resolution be forwarded immediately to the Maryland Congressional Delegation, other members of Congress as deemed appropriate, and to the President of the United States.

Adopted this ____ day of September, 2005.

Attest:

Jessie Carpenter, City Clerk



Local Government: Partner in Promoting Video Competition

Local government strongly endorses promoting competition for all consumers and treating like services alike. The elected leaders of our nation's cities and counties stand ready and willing to welcome video competition in their communities. Nationalizing franchising, however, would limit the benefits of head-to-head video competition to a chosen few, and would cause chaos in streets across the country.

Before Congress acts, it should consider:

- States where statewide or simplified franchising is currently in place do not see greater or faster video competition deployment.
- Franchises do not just provide permission to offer video services, they are the core tool local government uses to manage streets and sidewalks, provide for public safety, enhance competition, and to collect compensation for private use of public land. Eliminating franchises will cause chaos and deprive local government of the power to perform its basic functions.
- Competition is for everyone. Current national policy implemented through franchises encourages competition throughout the country, not just in urban or suburban areas and not just for the wealthy. In less than 10 years, under the current system, broadband service has been made available to 91% of all homes passed by cable.
- Congress should not try to manage local streets and sidewalks from Washington; national franchising would abrogate a basic tenet of federalism by granting companies access to locally owned property.
- Content deals, not local government, stands in the way of new video service offerings. Companies have not yet seriously dedicated resources to negotiate franchises in most markets. Potential video competitors require relatively few franchises to implement their announced business plans (for SBC 1,500-2,000 franchises, for Verizon 100-200 franchises).

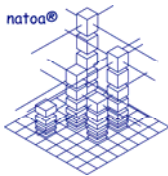
Concerns with Current Bills

Video Choice Act -- S. 1349 (Smith/Rockefeller) and H.R. 3146 (Blackburn/Wynn)

- Without a franchise agreement, many of the important mechanisms that local government uses to manage their rights of way, ensure competition for everyone, and collect franchise fees are eliminated.
- The bills do not allow local government to obtain support funding for public educational and governmental (PEG) channels or to obtain Institutional networks for local government needs such as fire, police, or other government workers.
- While the bills prohibit economic redlining against poorer citizens, they remove any enforcement of the provision.

Broadband Investment and Consumer Choice Act -- S. 1504 (Ensign/McCain)

- The bill would immediately abrogate all existing local franchise agreements. The new provisions would be applicable to all video service providers, both existing cable companies and new entrants.
- Although the bill retains the current five percent gross revenue cap on franchise fees, it limits the revenues from these fees in two ways: 1) by limiting these fees to the cost of managing the rights-of-way; and 2) providing four-and-a-half pages of exceptions to what can be included in the gross revenue costs, gutting existing contractual agreements.
- The bill prohibits municipalities from charging fees for issuing construction permits needed to install or upgrade facilities.
- Under the bill, video providers would be required to offer only four public educational and governmental (PEG) channels, far below what many communities utilize today.
- The municipal broadband provisions would impose additional layers of useless bureaucracy and procedure on local government and hamper broadband deployment. Existing municipal deployments would be frozen.
- The bill would remove the law that ensures cell phone towers, like all other towers, are subject to local zoning laws.



ACTION ALERT – S. 1504

Broadband Investment and Consumer Choice Act

- **Contact your congressional leaders today – tell them to oppose S.1504**
- Provide them with the real facts.
- Tell them about the real impact – the real harm – that this legislation would cause to local governments and to local residents.
- Inform them of the real benefits that local franchising provides to and within your community today!

Senators Ensign and McCain have introduced the Broadband Investment and Consumer Choice Act (S. 1504). This legislation is a blatant attempt to eviscerate the lawful power of state and local elected leaders, to undermine the principles of federalism, and to create an unnecessary and unwarranted subsidy – out of the budgets of local governments -- for an already healthy and wealthy private telecommunications sector. It has been estimated by one NATOA member that the bill would immediately cost local governments on the order of \$300 million per year in lost franchise fees alone, and much more in the future.

Your action is required NOW!!! The telephone and cable industry incumbents are telling members of Congress that local governments are not harmed by this legislation. There are some who claim that local government will be able to retain its franchise fee, PEG channels and PEG support, and that the bill even provides consumer protections. The bill does NOT protect local government revenue, it provides less than adequate capacity for PEG, eliminates PEG capital support and I-Nets, and turns what little consumer protection it permits over to the FCC for development and the states for enforcement.

Here's a little more about what this legislation will really do.

- All current cable franchising authority is eliminated.
- All current cable franchise agreements are preempted.
- Eliminates the 5% cable franchise fee and replaces it with a fee that must be both "reasonable" and limited to rights-of-way management costs and also not exceed 5%, and then allows industry to petition the FCC to reduce the fee still further -- this results in a huge subsidy to industry, paid for out of local government budgets.
- Substantially reduces the revenues that are includable in the definition of "Gross Revenues" so that, even if the 5% franchise fee were left untouched, local

governments' fee revenues would decline significantly due to the much smaller revenue base.

- Restricts PEG to a maximum of 4 channels, and specifies that the local government has the responsibility for determining, in cases where the number of channels must be reduced, which PEG users will no longer be provided access (*i.e.*, what categories of access users must bear the burden of the PEG channel capacity that the bill would eliminate).
- Eliminates all PEG support – capital and operating grants for PEG are eliminated, which will greatly threaten the continued viability of much of PEG programming.
- Moves all customer service issues to the FCC, to be enforced only by the State PUC.
- Eliminates any build-out requirements for any video service provider, thereby permitting providers to engage in any form of discriminatory redlining of neighborhoods they wish.
- Preempts any state or local law that is not generally applicable to all businesses, therefore threatening electric code and other safety obligations specifically pertaining to only certain classes of businesses (*e.g.*, utilities or rights-of-way users).
- Prohibits the imposition of any fee for issuance of rights-of-way construction permits.
- Requires local governments to act on construction permits in a timely manner as determined by the FCC or federal courts.
- Prohibits municipal provisioning of communications services without giving a right of first refusal to private industry and gives industry unfettered access to all municipal facilities and financing in the event private industry chooses to provide services.
- Eliminates local governments' ability to obtain I-Nets.
- Removes current federal law protections against preemption of local zoning decisions relating to cell towers.

Contact your congressional leaders today – tell them to oppose S.1504

Provide them with the real facts. Tell them about the real impact – the real harm – that this legislation would cause to local governments and to local residents, and the real benefits that local franchising provides to and within your community today.

Do not delay – contact your members while they are home for the August recess!!!

Need help gearing up for that Congressional visit? NATOA will host two audio conference calls August 10 and August 11 specifically for local government employees and advisors – Effectively Communicating with Your Elected Leaders. Join local government advocate Mike Bracy and NATOA's Executive Director, Libby Beaty, for a one-hour session that will refresh your advocacy skills and review the critical issues to be addressed in your telecom outreach meetings.

Check the Conference/Events page of the NATOA Website for dates, times and additional information on this upcoming opportunity.

The Honorable _____ [your U.S. Senator]

Senate Office Building
Washington, DC 20510
Via Facsimile: 202- _____

The Honorable _____ [your U.S. Senator]

Senate Office Building
Washington, DC 20510
Via Facsimile: 202- _____

Via US Mail and Facsimile:

Re: S. 1504 - Broadband Investment and Consumer Choice Act

Dear Senator _____ and _____:

I write to respectfully request that you oppose the pending Broadband Investment and Consumer Choice Act as introduced by Senators Ensign and McCain. This bill will be harmful to your constituents in my community, and it will deprive us of badly-needed funds that are currently part of our municipal budget. It is imperative that you not accept the assertions of industry stakeholders that the bill does not cause such harms. Although Senator Ensign indicated in his introductory remarks and in his summary of the proposed legislation that he believes his bill will encourage investment and competition and promote “widely affordable and high quality service, video and data services to all Americans,” I do not believe that will be the outcome if this bill were to become law.

While I fully support the introduction of competitive choice, and welcome innovation, the language of the Senator’s bill would not provide for such competitive choice or innovation to the citizens served by our communities. It would instead give windfall benefits to entrenched incumbent telephone and cable companies, deprive local governments and their residents of competitive alternatives, deny consumers effective means of redress, and suck millions of dollars of revenue per year out of local government budgets.

I would be pleased to review with you in detail the vast array of problems this proposed rewrite of our national communications law presents. To provide but a few examples, allow me to point out that on its face, S. 1504 does the following:

- The bill would preempt all local authority over the provision of cable and video services within the community, including the ability of local governments to provide appropriate oversight of entities conducting business within their jurisdiction and in their streets.
- Privately, previously negotiated contracts between local governments and cable operators would be abrogated under the terms of the bill, creating a huge and

unnecessary subsidy to private industry, a subsidy paid for out of local governments' budgets.

- The bill would eliminate the 5% cable franchise fee and replace it with a new compensation methodology on video providers' use of local streets that would deprive local governments of an agreed-upon bargain and substitute the federal government's judgment for that of the contracting parties, further interfering with the contract rights, obligations and benefits established under existing federal law. These new requirements and restrictions would result in the creation of a huge subsidy to the cable and telecommunications industries – again, a subsidy paid for by local governments and their taxpaying residents.
- The bill would further substantially reduce the revenues that are encompassed within the contractual and statutory definition of "Gross Revenues" in the current Cable Act, meaning that the bill would guarantee that local governments' revenues from franchise fees would be significantly less due to the smaller revenue base.
- The bill would substantially reduce the amount of capacity which may be required by local governments to meet their communities' needs in the form of public, educational and government ("PEG") access, while stripping local government of the ability to obtain support for the use of the capacity – part of the bargain contained within currently negotiated franchise agreements. The result is that local government will be unable to ensure that the community's needs and interests are addressed.
- The bill would deprive consumers of the ability to address local issues locally, by removing to the state all customer service issues, and further by denying consumers any form of recourse for any actions of a communications provider.
- The bill would eliminate any build-out requirements for any video service provider and thus permit video providers to discriminate in favor of upper income neighborhoods in making their services available.
- The bill would preempt the applicability of any state or local law to the communications industry that is not generally applicable to all businesses, therefore potentially preempting any state or local law applicable only to certain classes of businesses such as utilities or rights-of-way users (such as requiring utilities to underground their facilities or ensuring electric code compliance).
- The bill would prohibit local governments from imposing any fee for issuance of rights-of-way construction permits, yet would require local governments to act on requests for permits in a federally-prescribed "timely manner," thereby insinuating inappropriate federal government involvement in the basic management of local rights-of-way.
- The bill would prohibit municipalities and their utilities from providing communications services without giving a right of first refusal to private industry,

and then would grant private industry unfettered access to all municipal facilities and financing arrangements in the event private industry chooses to provide services.

- The bill would deprive local government of the ability to establish and maintain government owned and operated networks, known as institutional networks, that may be utilized by first responders and other government officials in the day-to-day management of the local government's business.
- The bill would eliminate current federal law protections against preemption of local zoning decisions relating to the placement of cell towers, depriving local government of the ability to ensure that such towers are safely and appropriately located in areas to provide the greatest degree of services without unnecessarily posing a hazard to the public health, safety and welfare.
- The bill would expose local governments to scores of new types of legal claims and lawsuits by the communications industry, while eliminating the damages immunity that local governments are granted under current federal law.

While some degree of reform to our existing telecommunications laws may be in order to better address the changes and convergence of technology, such modifications should not be made in the absence of reasoned and considered thought, which includes the consultation with state and local elected officials who also represent the concerns of the citizens of this great nation. To craft laws only for the protection and benefit of private industry, to the exclusion of the public interest, would be a disservice to both our constituents and our county. I trust that I may rely upon your good judgment to ensure that your local and state partners are fully consulted, and the needs of their constituents fully considered, before you take action on any pending rewrite of the telecommunications laws.

Local governments support competition and are excited to see the introduction of new services within our communities. We have a long and very successful history of supporting the introduction of such services, and are proud of the extensive successful deployment of broadband infrastructure by the cable industry, a successful deployment made possible in large part by the current system of local cable franchising. Unfortunately, S. 1504 fails to learn the lessons of that successful deployment, and we believe the bill would result in less competition and less choice overall for consumers. For these reasons, I ask that you oppose this legislation.

Thank you for your time and attention.

Sincerely,

From NATOA: S1349 Action Alert #1, July 2005

As many of you are now aware, on Thursday, June 30, new legislation was introduced in both the Senate and House which will negatively impact local governments franchise authority. While at first blush the legislation may appear to be some what innocuous or even handed – it does provide for franchise fees, it does provide for PEG – but if you read carefully, you'll see that there is a lot that it does not provide for – and most importantly, it does not provide you with the same type of control over your franchise area as you have with other users of the public rights of way.

Senators Gordon Smith (R-Oregon) and John Rockefeller (D-WV) introduced S. 1349, the 'Video Choice Act of 2005. They were joined in their efforts by Reps. Marsha Blackburn (R-TN) and **Albert Wynn (D-MD)** who introduced H.R. 3146, a bill bearing the same name, but with slightly different terms. Both bills, however, establish the dangerous rule that any entity with authority to be in a community's rights-of-way has the right to provide cable. The good news is that both bills were introduced with no additional co-sponsors. Our mission must be to limit the number of co-sponsors of this legislation and to show that the idea of denying local governments and consumers the safeguards of local franchising process is not an idea that many members of Congress support.

We are encouraging you to use this time when your Senators and Representatives are home for the July 4 holiday to contact them at their district offices and be sure to let them know how important the role of local government is in the management and control of our public rights of way – and just as importantly – at the negotiating table. If only they'd ask – if only they'd use the resources such as the long history and expertise of NATOA's members – they'd learn a lot and likely would cause less harm with their ideas for solving problems that we all do share.

Here's a sample letter to use to send to your representative on this latest legislation. There are other samples as well on the Policy/Advocacy page of the NATOA website. (natoa.org)

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Dear Senator (Representative)

As a local franchising professional and a constituent I write to make clear that local government strongly endorses competition for all consumers. I also believe that government at the Federal, state and local level should treat like services alike.

For these reasons I request your leadership in opposing S. 1349 (H.R. 3146), the so called 'Video Choice Act of 2005.' Local government welcomes the day that wire-to-wire competition between cable and telephone companies offers consumers real choice. Since Congress first authorized the local telephone company to provide cable within its service area in 1996, our community has been awaiting this competition. We fear however that this legislation, because it does not treat like services alike, could result in market disruptions and will continue to deny consumers the long promised telco-cable competition.

Consistent with our mutual goals of promoting competition for all our citizens, I know that my colleagues in local government stand ready to engage with Congress as it considers changes and reforms to the existing system.

Respectfully,

ACTION ALERT 9/7/05 UPDATE FROM NATOA Ex.Dir. Elizabeth Beaty

While I know that much attention is being devoted to the hurricane relief efforts (as is most appropriate), and today the country is in mourning over the loss of the Chief Justice (who served our country admirably), at some point in the coming days/weeks, there are many who will turn their attention to the business at hand, and many of them will be focused on video entry by the telephone companies.

Over the August recess, NATOA members in Massachusetts met with Congressman Markey, members in Oregon met with Senator Wyden, and members in Illinois met with their congressional representatives. These members and others came out of their meetings saying that local governments are about to be sold down the river on the franchising question.

The message is that franchising is a quick and easy target – that no congressional member thinks they will lose an election bid over giving up telco franchising – that they would gain the support and adoration (and money) of the telephone and the cable companies if they preempt local governments on franchising – that they have companion bills in the House and Senate that already have upwards of over 30 co-sponsors and that it's an easy means of saying that they got something done. Doing the national franchise bills would not impede the work of Senator Stevens, as it's only a small part of the telecom rewrite, and might actually take some of the heat off of other issues he cares about.

So, our concern is that local franchising is an easy target – that local government has been too lax about thinking we have more time – that the industry has great momentum and we are way behind.

Congress may not vote this fall –they may wait until spring or later – but anything introduced thus far and during the fall will set the marker for what's to come.

Therefore, we believe that it is urgent that local elected officials contact their state's delegation to Congress and ask them to oppose S. 1504, S. 1349 and HB 3146. NATOA has material on its web site to help develop talking points, but keep it brief and to the point. These bills will hurt our communities and WILL NOT lead to faster, more ubiquitous or more affordable broadband service. Remind your Congressional delegation that the telephone industry made these same promises in 1996.